

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

James McDonald

Plaintiff

No. C10-1952-RSL

v.

**OneWest Bank, FSB,
Northwest Trustee Services,
Mortgage Electronic Registration Systems,
Defendants.**

Plaintiff's Motion for Ex Parte Order to
Compel Defendants to Identify Witnesses
and Documentary Evidence and to Present
Certain Witnesses

**NOTING DATE 1/22/2013
SAME DAY MOTION**

REQUEST FOR SAME DAY EX PARTE RULING

Plaintiff requests the Court to hear this Motion and render decision on the same day that it is noted pursuant to LRC 7(d) as an *ex parte* motion due to the impending evidentiary hearing scheduled for January 31, 2013.

MOTION

The instant Motion is made based the Court's Order for Evidentiary Hearing issued on December 6, 2012, whereupon the Defendants were ordered to be prepared to "present witnesses, including Charles Boyle and any other knowledgeable person(s) ..." to address various matters at the evidentiary hearing which is scheduled for January 31, 2013.

To date, the Defendants have yet to identify the witnesses or the documentary records they will present at the evidentiary hearing. Plaintiff therefore requests that Defendants so identify

1 their witnesses and produce any material they will rely upon immediately. This is to allow
2 Plaintiff the opportunity to test the authenticity of the materials introduced and the credibility
3 of witnesses presented at the evidentiary hearing.

4 By way of background, the Defendants are seeking to introduce additional evidence
5 long after the discovery cutoff has expired, including a declaration submitted by Chris
6 Corcoran. Therefore, the Court ordered an evidentiary to be held on January 31, 2013, so that
7 the Defendants can explain, inter alia, the reasons for their failure to disclose as well as to
8 establish the factual basis of Charles Boyle's declaration submitted in support of the
9 Defendants' motion(s) for summary for summary judgment.

10 The following witnesses must be presented by the Defendants because they have
11 asserted personal knowledge, made declarations under penalty of perjury, or prepared and
12 submitted documents for recording in the public records or to be considered by this Court in its
13 determination of the dispute between the parties, including the questions and issues set forth in
14 the Court Order of December 6, 2013:

15 **Vonnie McElligott** as employee of NWTs who possesses personal knowledge of the
16 contents of the Notice of Trustee's Sale that she prepared and caused to be recorded in the
17 public records. Ms. McElligott also has personal knowledge of the contents and the manner of
18 how Notice of Default, Appointment of Successor Trustee and other foreclosure documents
19 prepared and originated by NWTs, where OneWest was identified as the owner or holder of
20 the Note. Ms. McElligott also possesses personal knowledge relating to NWTs' response to
21 Plaintiff's dispute of reports made to the credit reporting agencies.

1 **Heide Buck-Morrison** is an employee of Routh Crabtree Olsen. Ms. Buck-Morrison has
 2 personal knowledge and can testify to the factual basis supporting her representations to the
 3 Court in the following:

- 4 • In Defendant's Opposition to Plaintiff's Motion for TRO, Ms. Buck-Morrison
 5 represented to the Court: "OneWest does not dispute that Freddie Mac is the
 6 investor."
- 7 • In Defendants' First Motion for Summary Judgment, Ms. Buck-Morrison echoed
 8 Mr. Charles Boyle's Declaration and stated affirmatively that "Indymac Bank,
 9 FSB, sold Plaintiff's Note to Federal Home Loan Mortgage Company ... Freddie
 10 Mac has remained the investor and owner of the Note" and, "OneWest does not
 11 dispute that Freddie Mac is the investor/owner of the Loan." (Doc. 49, page 2, ¶2;
 12 page 8, ¶3).
- 13 • In the Defendants' Reply of the Defendants' First Motion for Summary Judgment,
 14 Ms. Buck-Morrison stated that "Defendants do not rely on the pooling and
 15 servicing agreement" reinforcing the Defendants' position that the Note was sold
 16 directly to Freddie Mac, not via a securitized trust, and thus no reliance on a
 17 pooling and servicing agreement (Doc. 57, page 3). Ms. Buck-Morrison wrote
 18 again in the Defendants' Opposition to First Amended Complaint that "Freddie Mac
 19 was and has remained the investor and owner of the loan." (Doc. 75)
- 20 • In the Defendants' Response to Plaintiff's Motion for Summary Judgment, Ms.
 21 Buck-Morrison asserted that "Indymac Bank, FSB, sold Plaintiff's Note to Federal
 22 Home Loan Mortgage Company ... Freddie Mac has remained the investor and
 23 owner of the Note." (Doc. 124, page 2, line 11).

- In the Defendants' Second Motion for Summary Judgment, Ms. Buck-Morrison wrote: "Thereafter, Indymac Bank, FSB sold Plaintiff's Note to Federal Home Loan Mortgage Company ... Freddie Mac has remained the investor and owner of the Note." (Doc.123, page 2, line 9). On the Reply, Ms. Buck-Morrison repeated that the loan is "owned" by Freddie Mac, after "the sale of the Note to Freddie Mac" (Doc.133, page 12, line 4).

Ms. Heidi Buck-Morrison, as well as other attorneys representing the Defendants, asserted repeatedly that OneWest has been in physical possession of the Note. Therefore, the Defendants and their counsel must produce the original Note at the evidentiary hearing as well as all records, written or otherwise, evidencing the manner and location where the original Note has been maintained from the date it was executed until the present.

Erica-Johnson Seck signed the Beneficiary Declaration dated January 27, 2010 as Vice President for OneWest, stating under penalty of perjury that "OneWest Bank, FSB is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." Ms. Johnson-Seck is the witness who has personal knowledge of OneWest's status as holder of the Note during this relevant time period.

In addition to the presentation of the foregoing named witnesses, Defendants must also present the original Note they claimed has been in their possession together with written proof of where and how the Note has been maintained from the time of execution to the present.

CONCLUSION

For the reasons stated above, Plaintiff respectfully prays the Court to issue an ex parte Order Compelling the Defendants to Disclose Witnesses they will present and all documentary

1 evidenced to be relied upon at the evidentiary hearing to Plaintiff no later than January 25,
2 2013.

3 DATED: January 22, 2013.

4 /s/ Ha Thu Dao

5 _____
Ha Thu Dao, WSBA 21793
Attorney for Plaintiff
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7 Phone: 727-269-9334/Fax: 727-264-2447

8 **CERTIFICATION OF SERVICE**

9 I hereby certify on January 22, 2013., the foregoing document is being served via **X**
First Class Mail ___ Priority Mail, ___ Messenger Service ___ Facsimile ___ Electronic Mail **X**
10 ECF, upon the following parties:

11 Heidi Buck Morrison and Charles Katz, Attorneys for Defendants
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17 /s/ Ha Thu Dao

18 _____
Ha Thu Dao